Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

ROGER GRUBBS,

Petitioner,

v.

KEN G. BAILES; MANUEL BALLARD; HASKELL COUNTY, a duly designated county of the State of Oklahoma,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals for the Tenth Circuit, affirming the order of the United States District Court for the Eastern District of Arkansas, which granted summary judgment for the Respondents on the Petitioner's suit under 42 U.S.C. § 1983 for false arrest, malicious prosecution and violation of the right to equal protection of the law, decided an important federal question in a way that conflicts with this Honorable United States Supreme Court's decisions concerning summary judgment: to wit: *Celotex Corp. v. Cantrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) and which also conflicts with the decisions of many other circuits concerning summary judgment.

Whether the Court of Appeals for the Tenth Circuit, affirming the order of the United States District Court for the Eastern District of Arkansas, which granted summary judgment for the Respondents on the Petitioner's suit under 42 U.S.C. § 1983 for false arrest, malicious prosecution and violation of the right to equal protection of the law denied the Petitioner's right to a trial by jury under the Seventh Amendment to the United States Constitution in such a way that misapplied the law, which has not been directly addressed by this Honorable United States Supreme Court.

Whether the Court of Appeals for the Tenth Circuit, affirming the order of the United States District Court for the Eastern District of Arkansas, which granted summary judgment for the Respondents on the Petitioner's suit under 42 U.S.C. § 1983 for false arrest, malicious prosecution and violation of the right to equal protection of the law decided

an important federal question concerning the Petitioner's claim for equal protection that conflicted with a decision of the Court of Appeals for the Seventh Circuit: to wit: *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995).

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OPINIONS BELOW

The Opinions of the Court of Appeals filed on April 26, 2006, and the District Court filed on June 21, 2005, are set forth respectively at Appendix A and Appendix B. The Court of Appeals Opinion was published at *Grubbs v. Bailes*, 445 F.3d 1275 (10th Cir. 2006).

STATEMENT OF JURISDICTION

This Honorable United States Supreme Court has general appellate jurisdiction under 28 U.S.C. § 1254 over this matter, as it concerns a decision of the United States Court of Appeals for the Tenth Circuit entered on April 26, 2006, which, rejecting the Petitioner's claim of a violation of the 4th Amendment and the 14th Amendment to the United States Constitution concerning the false arrest and malicious prosecution and violation of equal protection of the law, affirmed the decision of the United States District Court for the Eastern District of Oklahoma, which granted summary judgment for the Respondents.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Seventh Amendment to the United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. . . .

Okla. Stat. Ann. Title 21 § 1289.16:

> It shall be unlawful for any person to willfully or without lawful cause point a shotgun, rifle or pistol or any deadly weapon, whether loaded or not, at any person or persons for the purpose of threatening or with the intention of discharging the firearm or with any malice or for any purpose of injuring, either through physical injury or mental or emotional intimidation or for the purposes of whimsy, humor or prank, or in anger or otherwise, but not to include . . . in defense of any person, one's home or property. . . .

INTRODUCTION

The Petitioner respectfully suggests that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on this matter should be granted, as the order of the Court of Appeals decided important federal questions in a way that conflicts with relevant decisions of this Honorable United States Supreme Court and decisions of the other circuits. *See* U.S. Sup. Ct. R. 10(a) & (c). Essentially stated, the Court of Appeals, in its published decision concerning this matter, set a new standard for determining whether disputed facts in a summary judgment motion should be resolved in favor of the movant or the non-movant, against established law. *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Further, the Petitioner respectfully suggests that the Court of Appeals incorrectly cited and incorrectly applied the federal law of summary judgment and the state law concerning the defense of property. *Celotex Corp. v. Cantrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); Okla. Stat. Ann. Title 21 § 1289.16.

The Petitioner also respectfully suggests that the Court of Appeals, in its published decision, essentially denied the Petitioner's right to a jury trial, as mandated by the Seventh Amendment. Further, the Petitioner respectfully suggests that this is an issue of significant public policy and constitutional importance that this Honorable United States Supreme Court should address. Moreover, the Petitioner respectfully suggests that this case offers this Honorable United States Supreme Court the opportunity to address the issue of the interrelationship of the Seventh Amendment and the summary judgment process. *See* U.S. Sup. Ct. R. 10(c).

Finally, the Petitioner respectfully suggests that the Court of Appeals for the Tenth Circuit, in its published decision, denying the Petitioner's suit under the Equal Protection Clause to the 14th Amendment because of the lack of proof of disparate treatment concerning other parties, conflicted with a decision of the United States Court of Appeals for the Seventh Circuit, which allowed a suit for a violation of the Equal Protection Clause, where there is a claim for malicious prosecution, even though there is no evidence of disparate treatment. *Esmail v. Macrane*, 53 F.3d 176, 179-80 (7th Cir. 1995) (citing *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547 (1985) and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 423, 446-47, 105 S. Ct. 3249, 3257-58, 87 L. Ed. 2d 313 (1985)). *See* U.S. Sup. Ct. R. 10(a).

STATEMENT OF THE CASE

The Petitioner, Roger Grubbs (hereinafter "Grubbs"), was a stockholder in and president of the McCurtain Lake Club, Inc. (hereinafter "Club") The Club owns approximately 320 acres around McCurtain Lake. The stockholders each have a small tract of land that is leased, rent free from the Club. In addition to these tracts of land, there are several hundred acres of wilderness land that is used by the stockholders. Adjacent to the Club is private property that is used by people driving recreational vehicles, such as motorcycles and four-wheelers.

The Club's land was fenced and posted with "No Trespassing" signs. Over the years, the motorcycles and four-wheelers have trespassed onto the land of the Club, disturbing Grubbs and other stockholders in the quiet enjoyment of the property. Grubbs and other members of the Club made a

number of complaints to the local law enforcement authorities about the trespassing over the years, but nothing was done.

Grubbs had previously brought a successful complaint against a County official for illegal dumping. This resulted in problems for Grubbs.

On January 1, 2002, several trespassers entered the Club's property on their recreational vehicles. Grubbs went to tell them to leave. The trespassers threatened Grubbs. Grubbs had a pistol with him for protection. Grubbs and the trespassers both independently called the sheriff. Undersheriff Ken Bailes responded. Bailes took statements. The trespassers claimed that Grubbs pointed the pistol at them. Grubbs denied doing so. Grubbs attempted to show Bailes that the fence had been cut, but he refused. "No Trespassing" signs were near that spot. No arrests were made. Bailes forwarded the statements to the Assistant District Attorney.

Subsequently, the Assistant District Attorney directed Bailes to make a probable cause affidavit, which he did. The affidavit only mentioned the statements of the trespassers, did not mention the statement of Grubbs, and failed to include the fact that the fence had been cut or that the property was posted with "No Trespassing" signs. The affidavit contained no recitation of facts and just the bare assertion that Grubbs had pointed a pistol at the trespassers. An arrest warrant was issued for Grubbs. Grubbs turned himself in upon learning of the warrant in the newspaper.

Subsequently, Grubbs' criminal attorney, *without the knowledge or permission of Grubbs*, at the request of the State, arranged for the dismissal of the charges against

Grubbs, upon the payment of court costs by Grubb's criminal attorney and not by Grubbs. Thus, Grubbs did not have the opportunity to fully and fairly litigate the issue of probable cause in the criminal matter.

The record also shows that Bailes was involved in the investigation of a complaint by Grubbs against the same County official for assault and battery subsequent to the successful complaint about the County official illegally dumping but before the incident which forms the basis of this suit. Bailes was very angry about the complaints by Grubbs, indicating his bias against Grubbs and showing that Bailes had a predisposition to maliciously prosecute Grubbs.

Grubbs then brought suit against Haskell County, Sheriff Manuel Ballard, and Undersheriff Ken Bailes for violation of his civil rights, under, inter alia, the 4th and 14th Amendments and pursuant to 42 U.S.C. § 1983. Grubbs, first, alleged an inadequate investigation and false and omitted facts in the probable cause affidavit resulting in Grubbs' arrest without probable cause and, second, alleged that the arrest was, in fact, because of animosity against Grubbs for his previous successful complaint against a County official and that the County refused to enforce the law in his favor. Essentially, Grubbs brought claims for false arrest, malicious prosecution, and violation of the right to equal protection.

The District Court granted summary judgment for the Defendants on the ground of qualified immunity as to Grubbs' first claim on the basis that the affidavit contained no misstatements. As to Grubbs' second claim, the District Court granted summary judgment for the Defendants on the grounds of lack of standing by Grubbs to bring his claim and the lack of a practice or policy precluding the enforcement of trespassing laws. The District Court dismissed Grubbs' suit.

Grubbs appealed the order of the District Court. As to Grubbs' first claim, the Court of Appeals found that: (1) Grubb's contrary version of the events did not vitiate the probable cause afforded by the trespassers' version of events, (2) the facts omitted from the affidavit would not have vitiated the probable cause for the arrest, (3) absent felonious activity, there is no right to use a firearm in the defense of property, and (4) there were no genuine issues of material fact which would warrant placing the issue of probable cause before a jury. As to Grubbs' second claim, the Court of Appeals found that, although Grubbs did have standing to bring his claim, there was insufficient evidence to show that Grubbs had been treated differently from other persons who had brought trespassing claims. The Court of Appeals affirmed the order of the District Court granting summary judgment.

REASONS FOR GRANTING THE PETITION

A. STANDARD OF REVIEW

The standard of review concerning motions for summary judgment is *de novo*. *Toomer v. City Cab*, 443 F.3d 1191 (10th Cir. 2006).

B. STANDARD OF LAW

Summary judgment should not be granted where there are genuine issues of material fact. *See, e.g., Celotex Corp. v. Cantrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Summary judgment is a drastic remedy that must be exercised with care to prevent facts from being taken from the jury. *Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286, 289 (8th Cir. 1988). The evidence of the non-movant is to be believed and justifiable inferences are to be drawn in

the non-movant's favor. *Kalamazoo River Study Group v. Rockwell International*, 171 F.3d 1065, 1068 (6th Cir. 1998). The court may not weigh the evidence, judge credibility, or determine truthfulness when evaluating a motion for summary judgment. *Kampoures v. St. Louis Symphony Society*, 210 F.3d 845, 847 (8th Cir. 2000). Disputed issues of fact are to be resolved against the moving party. *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

In the context of a civil rights suit, the issue of whether there was probable cause for an arrest is a fact question that should be decided by the jury. *See, e.g., BCR Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 10 (1st Cir. 1984); *Reeves v. City of Jackson*, 608 F.2d 644, 651 (5th Cir. 1979); *Gilker v. Baker*, 576 F.2d 245, 246-47 (9th Cir. 1978). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 147 (1970); *DeLoach v. Beavers*, 922 F.2d 618 (10th Cir. 1990); *Fiordana v. Lee*, 434 F.2d 1227 (8th Cir. 1970); *Beauregard v. Wingard*, 362 F.2d 901 (9th Cir. 1966); *Anderson v. Haas*, 341 F.2d 497 (3d Cir. 1965). Indeed, in a civil rights suit, the courts have specifically recognized that where there is a dispute as to the alleged facts in support of an arrest, the jury should resolve the existence of probable cause for the arrest. *See, e.g., Santiago v. Fenton*, 891 F.2d 373, 388 (1st Cir. 1989).

C. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN VIOLATION OF THE STANDARD OF LAW ESTABLISHED BY THE UNITED STATES SUPREME COURT FOR THE EVALUATION OF SUMMARY JUDGMENT MOTIONS, WHICH REQUIRES ALL DISPUTES OF FACT TO BE RESOLVED AGAINST THE MOVING PARTY

It is axiomatic that omissions of relevant facts from an affidavit that would vitiate probable cause are grounds for a finding of lack of probable cause. In the instant matter, Grubbs not only brought to the attention of law enforcement that the riders were trespassing, but that a fence had been cut. He also stated that the trespassers had threatened him. Law enforcement was subsequently directed to the "No Trespassing" signs. It was also known that Grubbs had an acrimonious relationship with County officials because of successful complaint brought against a County official. This critical information was omitted from the affidavit presented in support of the application for Grubbs' arrest.

Under Oklahoma law, a firearm can be used in the defense of property. Okla. Stat. Ann. Title 21 § 1289.16. Further, malicious destruction of property can be a felony in Oklahoma. Okla. Stat. Ann. Title 21 § 1760. Thus, the omitted critical information most likely would have provided sufficient grounds to show that probable cause for the arrest of Grubbs did not exist. Indeed, all of the omitted critical information, if presented to a jury, as required by law, would easily be within the realm of a rational decision in favor of a finding of no probable cause.

In the instant matter, affirming the District Court, the Court of Appeals acknowledged that there was a factual dispute about whether Grubbs pointed the pistol at the trespassers. This is a genuine issue of material fact that would bear on the existence of probable cause for the arrest of Grubbs and goes to the very heart of the issue – whether there was probable cause to arrest Grubbs. The probable cause affidavit lacked any information that the trespassers had threatened Grubbs; lacked any information about the fence being cut, which can be a felony which would then provide justification even if Grubbs had used his pistol; lacked any acknowledgment of the "No Trespassing" signs; and contained nothing about the acrimonious difficulties between Grubbs and the County officials. Moreover, the probable cause affidavit lacked information about the ongoing problems with the trespassers and the County's failure to enforce the law. All of these highly relevant facts were known to Bailes and were omitted from the probable cause affidavit. The courts have acknowledged that omitting such information from a probable cause affidavit is a ground for a civil rights suit for false arrest. *See, e.g., DeLoach v. Bevers*, 922 F.2d 618, 621-22 (10th Cir. 1990). Further, the courts have recognized that there is a duty to reasonably investigate allegations before arresting a person for a crime, otherwise civil rights liability may attach. *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1258-59 (10th Cir. 1998).

The Court of Appeals (as did the District Court), despite acknowledging the dispute of material fact as to what occurred, essentially weighed evidence, judged credibility, and determined truthfulness by upholding summary judgment against Grubbs. Such an act violates the standards for granting summary judgment. All facts and inferences are to be taken in favor of the non-movant and all disputed issues

of fact are to be resolved in favor of the non-movant. *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). This was not done. The lower courts substituted themselves for the jury. These rulings conflict not only with the standard for summary judgment used by every other circuit, they also conflict with the standard for summary judgment required by this Honorable United States Supreme Court.

Regardless, even if Grubbs had brandished his pistol in the presence of the trespassers, which Grubbs contests, Oklahoma law specifically allows for the use of firearms in the defense of property. Okla. Stat. Ann. Title 21 § 1289.16. It is instructive to note that the cases cited by the Court of Appeals in support of the proposition that there is no right to use a firearm in defense of property were all dated 1947 and earlier. The Oklahoma statute that allows for the defense of property with a firearm was enacted in 1971, decades after these older decisions. Okla. Stat. Ann. Title 21 § 1289.16. The statute contradicts the rulings of these older cases and, thus, controls and applies to Grubbs in this matter. Regardless, the court of appeals acknowledged that these old cases included the caveat "absent a threat of felonious activity", which, at least for the purposes of summary judgment where the facts are to be resolved in favor of the non-movant, was present in this matter by the destroyed fence and the threats by the trespassers.

Indeed, Grubbs respectfully suggests that because the Court of Appeals affirmed the grant of summary judgment where there was a dispute of material fact, the decision of the Court of Appeals was not in accordance with this Honorable United States Supreme Court's decision of *Celotex Corp. v. Cantrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Grubbs respectfully suggests that the order of the Court of Appeals, incorrectly citing the law relative to summary judgment and incorrectly applying it is an issue of public significance that conflicts with decisions of this Honorable United States Supreme Court and other circuits such that his Petition for a Writ of Certiorari should be granted. Further, Grubbs respectfully suggests that this matter is an excellent opportunity to clarify the standard of summary judgment in this context.

D. THE COURT OF APPEALS IMPROPERLY DENIED GRUBBS A TRIAL BY JURY, WHICH IS GUARANTEED BY THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, UNDER THE RUBRIC OF THE SUMMARY JUDGMENT PROCESS

It is undisputed that a plaintiff has the right to a trial by jury under the Seventh Amendment to the United States Constitution in a civil matter. Such a right applies to causes of action for violations of civil rights.

In the instant matter, Grubbs demanded a trial by jury. In the instant matter, the Court of Appeals (and the District Court) essentially believed the facts that were offered against Grubbs, weighed the evidence, judged credibility, and determined truthfulness, in violation of established law concerning the evaluation of requests for summary judgment. Indeed, this Honorable United States Supreme Court has recognized that there are sharp limitations when there is a right to a trial by jury and a motion for summary judgment is being considered. *Weinberger v. Hynsen, Westcott & Duning, Inc.*, 412 U.S. 609, 622, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 147 (1970)).

Grubbs respectfully suggests that the Court of Appeals ignored the established standards and limitations for evaluating summary judgment to the extent that Grubbs was denied his right to a trial by jury. The disputed material facts should have been examined by a jury; the Respondents' version of the facts concerning Grubbs' arrest should not have been summarily accepted; and this matter should have been remanded to the district court for trial by jury, as guaranteed by the Seventh Amendment to the United States Constitution. Grubbs respectfully suggests that the Court of Appeals violated the ruling of this Honorable United States Supreme Court in *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), which requires all issues of fact to be resolved against the moving party, and thereby denied Grubbs' right to a trial by jury.

Grubbs respectfully suggests that the denial of his right to a trial by jury is an issue of public significance and constitutional importance that conflicts with decisions of this Honorable United States Supreme Court and other circuits such that his Petition for a Writ of Certiorari should be granted. Grubbs also respectfully suggests that this is a significant issue of public policy and constitutional importance that this Honorable United States Supreme Court should address. Moreover, this case offers this Honorable United States Supreme Court the opportunity to address the issue of the interrelationship of the Seventh Amendment and the summary judgment process.

E. THE COURT OF APPEALS INCORRECTLY STATED GRUBBS FAILED TO ARGUE HIS CLAIM OF MALICIOUS PROSECUTION TO THE DISTRICT COURT, AND IMPROPERLY DENIED GRUBBS' CLAIM UNDER THE EQUAL PROTECTION CLAUSE, IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONCERNING EQUAL PROTECTION CLAIMS

One of the grounds which formed the basis for Grubb's Complaint was that he was maliciously prosecuted because of his previously successful complaints against County officials. Although the malicious prosecution claim was acknowledged in the order of the court of appeals, the Court of Appeals stated that Grubbs failed to plead this cause of action or address at summary judgment before the District Court and would not address it.

In fact, Grubbs did plead the issue of malicious prosecution in paragraph 12 of his Complaint. Further, on pages 9, 18, and 19 of his response to the motion for summary judgment, Grubbs did argue the malicious prosecution aspect of his complaint. The statement of the Court of Appeals that this issue was not pled or argued to the District Court is incorrect.

The courts have recognized that a prosecution initiated for malicious reasons states a cause of action for violation of civil rights, under the 14th Amendment, even if there has been no unequal treatment where other parties have been treated more leniently. *See Esmail v. Macrane*, 53 F.3d 176, 179-80 (7th Cir. 1995) (citing *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547 (1985)

and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 423, 446-47, 105 S. Ct. 3249, 3257-58, 87 L. Ed. 2d 313 (1985)). As recognized by the Court of Appeals for the Seventh Circuit, although such an equal protection claim is different than the regular "plain vanilla" equal protection claims which requires others to be treated differently, such a situation still states a cause of action under the 14th Amendment.

Given this decision of the Court of Appeals for the Seventh Circuit, it is apparent that there is a split between the Seventh Circuit and the Tenth Circuit as to whether there can be a claim of a civil rights violation under the Equal Protection Clause of the 14th Amendment, even where there is no proof of disparate treatment, such that resolution of this difference by this Honorable United States Supreme Court is warranted. Further, Grubbs respectfully suggests that this is a significant issue of public policy and constitutional importance that this Honorable United States Supreme Court should clarify.

CONCLUSION

Based on the arguments and authorities presented, *supra*, the Petitioner, Roger Grubbs, respectfully prays that this Honorable United States Supreme Court GRANTS his Petition for a Writ of Certiorari to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED APRIL 26, 2006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 05-7076

ROGER GRUBBS,

Plaintiff-Appellant,

v.

KEN G. BAILES; MANUEL BALLARD; HASKELL COUNTY, a duly designated county of the State of Oklahoma,

Defendants-Appellees.

April 26, 2006

MURPHY, *Circuit Judge*.

Plaintiff Roger Grubbs appeals from the entry of summary judgment for defendants Haskell County, sheriff Manuel Ballard, and undersheriff Ken Bailes in this action under 42 U.S.C. § 1983. Plaintiff alleged that defendants violated his constitutional rights in two respects: (1) denying him equal protection under the law by failing to enforce trespass laws to protect his property, and (2) causing him to be arrested without justification for a firearm offense, based on misleading information provided to the prosecuting

attorney, after he personally confronted three trespassers. The district court rejected the first claim on alternative grounds, holding that it was barred by a prudential standing principle and that it failed in any event for lack of evidentiary support. The court granted summary judgment on the second claim for lack of evidentiary support as well. We affirm for the reasons explained below.

Plaintiff is one of some twenty shareholders in the McCurtain Lake Club Inc. (MLC), a corporation formed to acquire and hold certain lakeside land for the use of the shareholders. While all of the details regarding distribution of the land are not fully set out in the materials in our record, the parties do not dispute the pertinent facts. MLC owned the land and granted certain possessory rights to all shareholders free of charge. Specifically, each MLC shareholder was "leased" a cabin site for his or her exclusive use and was granted joint use of the remaining common areas. At times relevant to this action, plaintiff was also president of the corporation.

One of the common areas abutted non-MLC property that was used by the public for off-road activities involving dirt bikes, ATVs, and the like. Plaintiff alleges that he complained of frequent trespassing by these off-road enthusiasts over a period of years but that the authorities did not take sufficient action to protect MLC property from trespass. On January 1, 2002, he took matters into his own hands. Armed with a pistol, he confronted three people, a woman, her son, and her nephew, who he insisted were riding four-wheelers onto MLC property. Accounts of this incident differ: plaintiff claims he merely showed the alleged

trespassers that he was armed for self-protection; they reported that he pointed the pistol at them while ordering them to get off the property. Undersheriff Bailes was directed to investigate the conflicting complaints. He took statements from all parties and passed these on to assistant district attorney Danita Williams. He did not recommend any particular action, though he did comment that "[t]he property in question in my opinion is not posted correctly and I do not believe that there is a clear policy on what [plaintiff's] duties are as the president of [MLC]." Aplt.App. at 237. Bailes also made the obvious point that "[plaintiff] definitely has no right to pull a weapon on another person just to assert his opinions." *Id.*

Based on the statements and her own interviews with the complaining witnesses, Williams made the decision to prosecute plaintiff. *Id.* at 236.[1] She directed Bailes to fill out a probable cause affidavit and then presented the materials to secure a warrant. *Id.* Plaintiff was arrested and charged with violating Okla. Stat. tit. 21, § 1289.16 (felony pointing firearms), for "wilfully pointing a handgun at 13 year old J.H. his cousin J.A. and his mother Bobbie Jean Anderson for the purpose of threatening and ordering them off the property where they were riding 4 wheelers." Aplt.App. at

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1. Williams submitted two affidavits on defendants' behalf in this case. The first noted the statements she obtained from Bailes, while the second clarified that she had also personally spoken to the witnesses, *compare* Aplt.App. at 106 *with id.* at 236. Plaintiff "finds the latest affidavit to be suspicious," Aplt. Opening Br. at 8, but this kind of clarification, as distinguished from contradiction, is not a basis for discounting later testimony. *See Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1258 (10th Cir.2001).

242. Prior to trial, however, the case was dismissed without prejudice upon payment of court costs by plaintiff's counsel. *See id.* at 180, 184. Plaintiff then brought this action challenging his arrest and complaining of the Sheriff's failure to enforce the property rights of MLC and its members.

I. False Arrest/Malicious Prosecution

While constitutional claims for wrongful arrest, detention, and prosecution under § 1983 are analyzed in light of analogous torts, such as false arrest and malicious prosecution, the ultimate and indispensable element of such a claim is the deprivation of a constitutional right. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1285-90 (10th Cir.2004); *Taylor v. Meacham*, 82 F.3d 1556, 1560-61 (10th Cir.1996) ("[O]ur circuit takes the common law elements . . . as the 'starting point' for the analysis of a § 1983 malicious prosecution claim, but always reaches the ultimate question, which it must, of whether the plaintiff has proven a *constitutional* violation."). In the present context, "that constitutional right is the Fourth Amendment's right to be free from unreasonable seizures." *Taylor*, 82 F.3d at 1561; *see Pierce*, 359 F.3d at 1285, 1287 & n. 5. Accordingly, the focal point of our analysis is the probable cause supporting plaintiff's arrest, which rested on the complaining witnesses' statements indicating that plaintiff had used his pistol as a threat to force them off the premises.

Plaintiff alleges that his arrest was the product of Bailes' misleading presentation of the relevant facts. The constitutional inquiry for such a claim focuses on the

materiality of the misconduct in relation to the determination of probable cause:

> If an arrest warrant affidavit contains false statements, the existence of probable cause is determined by setting aside the false information and reviewing the remaining contents of the affidavit. Where information has been omitted from an affidavit, we determine the existence of probable cause by examining the affidavit as if the omitted information had been included and inquiring if the affidavit would still have given rise to probable cause for the warrant.

Taylor, 82 F.3d at 1562 (citations and quotations omitted). If hypothetically correcting the misrepresentation or omission would not alter the determination of probable cause, the misconduct was not of constitutional significance and is not actionable under § 1983, *see, e.g., id.* at 1562-63; but if this hypothesizing would alter the probable-cause determination, the misconduct undermined Fourth Amendment guarantees and may support redress under § 1983, *see, e.g., Pierce*, 359 F.3d at 1293-94.

A large part of plaintiff's objection to his arrest is simply his insistence that his contrary version of events should have been credited. There are two very basic deficiencies with this approach. First, it is uncontested that Bailes did not conceal or withhold plaintiff's statement, but passed it along with those of the complaining witnesses. Second, as a general matter, a suspect's contradiction of a witness' accusation is not sufficient to vitiate probable cause; otherwise it would

be virtually impossible to secure a warrant for anyone but a confessed offender. There is nothing compellingly credible or uniquely exculpatory about plaintiff's statement to afford it any exceptional significance in this case. The witnesses stated that he pointed his pistol; he stated that he merely showed it to them. Such disputes between accuser and accused are unremarkable in a criminal law setting. In his statement to Bailes, plaintiff claimed that one of the witnesses threatened to retrieve a gun and "get even," Aplt.App. at 101. Even if credited, however, this fact would not justify plaintiff making an earlier threat with his firearm that prompted this reaction.

Plaintiff complains that Bailes did not report certain facts about the incident that he insists would have altered the determination of probable cause. These facts, such as the presence of MLC property markers and the cutting of an MLC fence near a no trespassing sign, relate to his assertion that the complaining witnesses were trespassing when he confronted them. Once again, plaintiff's argument is not directed at a material issue. The operative statute does provide an exception for use of a gun "in defense of . . . one's home or property," § 1289.16, but threatening mere trespassers at gunpoint is not within its scope. Oklahoma law has long recognized that, absent a threat of felonious activity, the defense of property encompasses only the right to resist trespassers with reasonable non-deadly force and, thus, does not allow a landowner to threaten them with firearms. *See Sherrill v. State*, 43 Okla.Crim. 36, 277 P. 288, 288-89 (Okla.Crim.App.1929) (applying *Dickinson v. State*, 3 Okla.Crim. 151, 104 P. 923 (Okla.Crim.App.1909)); *see also Hovis v. State*, 83 Okla.Crim. 299, 176 P.2d 833, 836

(Okla.Crim.App.1947) (collecting cases summarizing relevant limitation on use of force to oppose mere trespasses). Accordingly, facts tending to show that the complaining witnesses were trespassing would not have vitiated probable cause to arrest plaintiff for threatening them with a firearm in violation of § 1289.16. Plaintiff also insists he had a *constitutional* right "to point a pistol at someone in the protection of his own property." Aplt. Opening Br. at 18. He cites no authority for such a right and this court will not create such authority.

Plaintiff also advances two very general objections to the district court's treatment of his arrest claim. Neither has merit. He first complains that the court failed to set forth a rationale for rejecting the claim. To the contrary, the court invoked the controlling probable cause inquiry, explained that Bailes had not made any false statements to factor into the analysis, and concluded that the asserted omissions would not have vitiated probable cause. Aplt.App. at 254. Its rationale is essentially the same as this court's. Plaintiff next insists that probable cause is a question for the finder of fact and, as such, is inappropriate for summary judgment. His premise is correct but his conclusion is unwarranted. Where, as here, there is no genuine dispute about its existence, probable cause, like any material fact, is amenable to summary judgment. *See, e.g., Wolford v. Lasater*, 78 F.3d 484, 489-90 (10th Cir.1996).

At points in his appellate briefing, plaintiff interjects his suspicion that Bailes acted in retaliation for plaintiff's confrontation with a county excise board member whom plaintiff had exposed for illegally dumping trash. It is true

that a criminal prosecution undertaken "to discourage protected speech or expression violates the First Amendment and is actionable under § 1983." *Wolford*, 78 F.3d at 488. No such First Amendment claim was pled at the outset or later invoked in opposition to summary judgment. For whatever reason, plaintiff chose to proceed on other constitutional grounds. He cannot revisit that decision at this late stage; we review the case as it stood before the district court. *See generally Switzer v. Coan*, 261 F.3d 985, 990 (10th Cir.2001).

II. Denial of Equal Protection under Trespass Laws

Plaintiff alleged that the Haskell County Sheriff's Office failed to enforce the trespass laws with respect to the MLC common area and thereby denied him equal protection under the law. This claim implicates two distinct issues on summary judgment.

A. Prudential Standing

As a general matter, shareholders suffer injury in the Article III sense when the corporation incurs significant harm, reducing the return on their investment and lowering the value of their stockholdings. *Franchise Tax Bd. of Cal. v. Alcan Aluminium, Ltd.*, 493 U.S. 331, 335-36, 110 S.Ct. 661, 107 L.Ed.2d 696 (1990). Satisfaction of constitutional standing requirements, however, is not the end of the inquiry:

> The more difficult issue is whether [shareholders] can meet the prudential requirements of the standing doctrine. One of these is the requirement

> that the plaintiff generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties. Related to this principle we think is the so-called shareholder standing rule. . . . [T]he rule is a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment.

Id. at 336, 110 S.Ct. 661 (citations and quotations omitted). This prudential prohibition on shareholder standing has a well-established exception, "allowing a shareholder with a *direct, personal interest* in a cause of action to bring suit even if the corporation's rights are also implicated." *Id.* (emphasis added); *see, e.g., Heart of Am. Grain Inspection Serv., Inc. v. Missouri Dep't of Agric.*, 123 F.3d 1098, 1102 (8th Cir.1997); *Cooper v. McBeath*, 11 F.3d 547, 551-52 (5th Cir.1994).

The district court invoked the shareholder-standing prohibition to hold that plaintiff lacked standing to complain of law enforcement's inadequate response to trespassing on MLC property. If plaintiff's only connection with the property had been his ownership of MLC stock, so that any injury to him was solely a function of injury to the corporation's property holding, such a purely derivative interest would fall within the scope of the prudential prohibition on shareholder standing. Plaintiff, however, has a distinct legally recognized interest in the property.

Appendix A

As noted earlier, MLC shareholders held their own possessory interest in MLC property: an individual leasehold in their particular cabin site and a joint interest in the common areas. Oklahoma law has long recognized that a possessory interest is sufficient to invoke a right against trespass. *See Lambert v. Rainbolt*, 207 Okla. 451, 250 P.2d 459, 461 (Okla.1952) (following *City of Okla. City v. Hill*, 6 Okla. 114, 50 P. 242, 247 (1897)). Indeed, the disruptive, noisy intrusion of trespassing off-roaders would appear to have a much more immediate and significant impact on the possessory rights of those, like plaintiff, using MLC property for their own enjoyment than on the corporation's formal ownership interest.

It thus appears that plaintiff has asserted a direct injury sufficient to satisfy the prudential standing principles in *Alcan*.[2] We need not, however, definitively resolve the matter

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2. Plaintiff's standing, however, is not wholly without doubt. In *Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065 (10th Cir.2002), which did not reference *Alcan*, a shareholder alleged that his corporation had been denied a lease based on his race in violation of 42 U.S.C. § 1981. His claim for emotional distress resulting from this corporate contractual discrimination was dismissed for lack of standing. We affirmed, rejecting his effort to avoid the shareholder-standing prohibition. That holding is consistent with *Alcan*, given the derivative nature of the alleged injury. However, we framed the operative exception differently, qualifying the requisite individual injury with a uniqueness element not included in *Alcan*: "the actions of the third party that injure the corporation [must] also cause injury to the shareholder *which is unique to himself or herself as a shareholder* of the corporation and *not suffered by the other shareholders*." *Guides*, 295 F.3d at 1072 (emphasis added). Applied

(Cont'd)

here. It has been noted on many occasions that the Supreme Court's rejection of the practice of "hypothetical jurisdiction" in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), prohibits

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(Cont'd)

here, this would suggest that despite harm to a personal interest otherwise sufficient for standing under *Alcan*, no MLC shareholder/lessee could sue because all suffered alike. On closer reading, though, it appears that *Guides* addressed a different shareholder-standing exception, one derived from *Stat-Tech International Corp. v. Delutes*, 47 F.3d 1054, 1060 (10th Cir.1995), which dealt with a state corporate law rule stated in *Nicholson v. Ash*, 800 P.2d 1352 (Colo.App.1990). This rule does not look for direct injury distinct from a shareholder's derivative harm; it looks for harm to the plaintiff *as a shareholder* but requires that it be unique in some way from that suffered by shareholders generally. *Id.* at 1357. *Combs v. PriceWaterhouse Coopers LLP*, 382 F.3d 1196 (10th Cir.2004), illustrates this point. In *Combs*, a minority shareholder claimed the majority shareholder had breached various fiduciary duties. Contending that harm to the plaintiff was only derivative of injury to the corporation, the majority shareholder invoked the shareholder-standing prohibition. In response, the plaintiff relied on *Nicholson*, leading this court to inquire whether he suffered " 'injury as a stockholder, unique to himself and not suffered by the other stockholders.' " *Id.* at 1201 (quoting *Nicholson*, 800 P.2d at 1357). When the plaintiff cited direct injuries he suffered as an employee distinct from his role as a shareholder (injuries *Alcan* would focus on), we held they *were not relevant* to the *Nicholson* rule: "[plaintiff's] claims of 'uniqueness' are injuries in his status as an employee, not a stockholder. As such, . . . they failed to establish a unique injury to [plaintiff] in his status as a shareholder." *Id.* Consistent with *Alcan*, we noted no standing problem affecting these claims; rather, we held that they "would necessarily fail on the merits," as it was only in his capacity as a shareholder that the plaintiff could invoke the underlying fiduciary duty necessary to support the claims. *Id.* at 1200 n. 2.

federal courts from disposing of claims on the merits without first resolving Article III standing issues. Questions relating to *prudential* standing, however, may be pretermitted in favor of a straightforward disposition on the merits. *See, e.g., In re Erie Forge & Steel, Inc.*, 418 F.3d 270, 275 n. 8 (3d Cir.2005); *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1274 n. 10 (11th Cir.1999); *Fraternal Order of Police v. United States*, 173 F.3d 898, 905 (D.C.Cir.1999); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir.1998). We therefore turn to the district court's alternative disposition on the merits for a conclusive resolution of plaintiff's equal protection claim.

B. Merits of Equal Protection Claim

Plaintiff's allegations regarding inadequate investigation/prosecution of those trespassing on MLC property do not implicate either a suspect class or a fundamental right.[3] As such, they fall under the rubric of a "class-of-one" equal protection claim, explicitly recognized in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).[4] *See, e.g., Jennings v. City of Stillwater*, 383 F.3d 1199, 1210, 1215 (10th Cir.2004) (analyzing victim's "reverse-selective enforcement claim" for

3. We note there is no evidence in the record that defendants' alleged failure to enforce trespassing laws with respect to MLC property was related to plaintiff's clash with the excise board member he turned in for illegally dumping trash.

4. "Class of one" is somewhat of a misnomer, in that what distinguishes such claims is the absence of a constitutionally salient class identification, not the number of plaintiffs per se. *See Olech*, 528 U.S. at 564 n. *, 120 S.Ct. 1073.

inadequate investigation of crime under "class of one" principles). An essential element of such a claim is that the plaintiff "has been intentionally treated differently from others similarly situated." *Olech*, 528 U.S. at 564, 120 S.Ct. 1073; *see, e.g., Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143, 1149 (10th Cir.2001) ("As with any equal protection claim, [the plaintiff in a "class of one" case] must also demonstrate that he was treated differently than another who is similarly situated." (quotation omitted)). Indeed, we have explained that for selective and reverse-selective enforcement claims, the plaintiff must "provide compelling evidence of other similarly situated persons who were in fact treated differently," because "the multiplicity of relevant (nondiscriminatory) variables" involved in law enforcement decisions "are not readily susceptible to the kind of analysis the courts are competent to undertake" in assessing equal protection claims. *Jennings*, 383 F.3d at 1214-15 (quotation omitted)

Here, plaintiff and other MLC shareholders/lessees have only testified or averred in general terms that defendants have failed to take sufficient action in response to a handful of trespassing complaints. The district court held that this evidence was insufficient to create a triable issue of constitutionally significant inadequate law enforcement per se. Without gainsaying that conclusion, we note the more glaring absence of evidence showing that defendants enforced trespassing laws in any different fashion with respect to other, similarly situated residents of the county. The entry of summary judgment based on the legal insufficiency of plaintiff's evidentiary showing on his equal protection claim was correct.

The judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA DATED AND FILED JUNE 21, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 03-695-P

ROGER STEVEN GRUBBS,

Plaintiff,

v.

KEN G. BAILES, MANUEL BALLARD, and HASKELL COUNTY, a duly designated county of the State of Oklahoma,

Defendants.

ORDER

Now before the court is the Motion for Summary Judgment filed by the defendants, Ken G. Bailes, Manuel Ballard, and Haskell County, a duly designated county of the State of Oklahoma. Plaintiff has filed a Response to the motion, and Defendants have filed a Reply. The instant case arises from a Complaint filed by the Plaintiff pursuant to 42 U.S.C.A. §1983 alleging violations of his Fourth, Fifth, Sixth and Fourteenth Amendment rights to the United States Constitution.[1]

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1. Plaintiff concedes Defendants' Motion for Summary Judgment in regard to his Fifth Amendment claim. (Plaintiff's Response to Defendants' Motion for Summary Judgment at 21).

Appendix B

The individual defendants have denied the Plaintiff's allegations and have asserted as an affirmative defense that they are entitled to qualified immunity. Further, Manuel Ballard, as policymaker for Haskell County, Oklahoma, asserts there is no policy or custom which caused a violation of Plaintiff's rights.

I. Background

Plaintiff, Roger Grubbs, is a stockholder in McCurtain Lake Club, Inc. The corporation was formed in the 90's by property owners surrounding McCurtain Lake. The property owners deeded their property to the corporation and in return each received a free life-time lease to 1/2 acre tract of land and stock in the corporation. Stock is tied to the property such that when one person sells their stock, the lease accompanies it. McCurtain Lake Club, Inc. owns approximately 320 acres around McCurtain Lake.

Plaintiff, as a stockholder in McCurtain Lake Club, Inc., lives in a house located on a 1/2 acre tract of property that he leases rent free from McCurtain Lake Club, Inc. In addition to Plaintiff, there are approximately twenty people that own McCurtain Lake Club, Inc.'s stock and lease property from the lake club. In addition to these plats of land, McCurtain Lake Club, Inc. has several hundred acres of unused wilderness property. Each stockholder pays yearly dues which cover maintenance, and property taxes, for the corporation's property. In January of 2002, Plaintiff was President of McCurtain Lake Club, Inc. Plaintiff is not currently the President.

Appendix B

Adjacent to the property owned by McCurtain Lake Club, Inc. is open private property that is used by four wheelers and motorcyclists for off-road recreational riding. Plaintiff alleges that on occasion these four wheelers and motorcyclists ride on land owned by McCurtain Lake Club, Inc. Plaintiff claims that prior to January 1, 2002, he had attempted to get the Haskell County Sheriff's Office to stop people from riding their off-road vehicles on McCurtain Lake Club, Inc. land.

Defendants contend that on January 1, 2002, Plaintiff took the law into his own hands. That afternoon, Plaintiff left his house and drove to a site he believed was located on McCurtain Lake Club, Inc. land, where three individuals were riding four wheelers. It is undisputed that Plaintiff took his loaded .357 magnum pistol and confronted the riders, two minors and one of the minor children's mother. During this confrontation, the three individuals allege Plaintiff pointed the firearm at them in a threatening manner. Plaintiff denies that he pointed the weapon, but admits that he was holding it in his hand.

As a result of this confrontation, the three riders called the Haskell County Sheriff's Office as did Plaintiff. Undersheriff Ken Bailes ("Bailes") came to the scene to investigate. Bailes took statements from the three riders and Plaintiff. Bailes then took these statements and wrote a letter to the Assistant District Attorney stating the facts as he knew them. Based on this letter, and the sworn statements of the witnesses, the Assistant District Attorney made an independent decision to file charges against Plaintiff. At that time the Assistant District Attorney asked Bailes to file a probable cause affidavit. The charges and probable cause

affidavit were taken to the Judge of Haskell County who upon review, issued a warrant of arrest for Plaintiff for feloniously pointing a firearm.

Plaintiff learned of the charges against him the next day when he read them in the local newspaper. Defendants state it is a small community and the local paper prints all criminal filings. Plaintiff obtained the services of a bondsman and surrendered himself. It is undisputed that none of the Defendants in this case arrested Plaintiff. Plaintiff bonded out the same day he surrendered himself. Ultimately, his criminal case proceeded, Plaintiff waived his right to a preliminary hearing and was bound over for trial. On the eve of trial, the criminal charges against Plaintiff were dismissed by the state in exchange for payment of court costs.

I. Qualified Immunity

The record establishes that Defendants were acting in their official capacity as public employees and are therefore entitled to qualified immunity unless Plaintiff clearly establishes that Defendants knowingly violated his Constitutional rights. *Siegert v. Gilley*, 500 U.S. 226 (1991); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Cleavinger et al. v. Saxner et al.*, 474 US. 193 (1985); *Valdez v. City and County of Denver*, 878 F.2d 1285 (10th Cir. 1989), *and Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812 (10th Cir. 1981). "The doctrine of qualified immunity provides that government officials generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

Clanton v. Cooper, 129 F.3d 1147, 1153 (10th Cir. 1997)(*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *Rozek v. Topolnicki*, 865 F.2d 1154, 1157 (10th Cir. 1989)

When a defendant pleads qualified immunity, the Plaintiff must then make a two-part showing. *See Clanton*, 129 F.3d at 1153; *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). "First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right." *Id.* "Second, the plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Id.* "In order to carry [this] burden, the plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant violated it. Rather, the plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity. . . ." *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995) (citations omitted).

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995) (quoting Anderson). Plaintiff is not required to show that the very conduct in question has previously been held unlawful. *See Anderson*, 483 U.S. at 640; *Albright*, 51 F.3d at 1535. He or she is, however, required to demonstrate the unlawfulness was "apparent" in light of established law. *SeeAnderson*, 483 U.S. at 640; *Albright*, 51 F.3d at 1535.

Generally, this requires that the Plaintiff demonstrate a "substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990); *see also Romero*, 45 F.3d at 1474. Unless the Plaintiff demonstrates both that the Defendant's conduct violated a federal right and the right was clearly established, the Defendant must be granted qualified immunity. *See Albright*, 51 F.3d at 1535.

Plaintiff's first cause of action alleges Bailes filed a false and erroneous affidavit which caused the Assistant District Attorney to file felony charges against Plaintiff. Plaintiff also claims the Defendant, Sheriff Manuel Ballard ("Ballard"), knew or should have known that Bailes' investigation contained false accusations. Bailes does not dispute it is clearly established law that knowingly or recklessly omitting material information from an arrest affidavit violates the arrestee's Fourth and Fourteenth Amendment rights. *See Stewart v. Donges*, 915 F.2d 572, 582-83 (10th Cir. 1990). Specifically, Plaintiff alleges Bailes omitted the fact the fence had been cut near a no trespassing sign.

"To determine whether an omission is material, and thus violates the arrestee's constitutional rights, [the court] must consider whether probable cause would exist if the information was included in the affidavit." *Id.* at 582 n.13. Bailes contends that because the affidavit contained no false information, and any omitted information's inclusion in the affidavit would not have vitiated probable cause, he did not violate Plaintiff's constitutional rights.

Appendix B

In the instant case, the probable cause affidavit in support of the arrest warrant contained no misstatements to either the Assistant District Attorney, or the Judge. All four statements, which included statements from the three alleged trespassers, and Plaintiff, were presented to the Assistant District Attorney. The probable cause affidavit contains accurate information. Plaintiff's complaint is that Bailes believed the three individuals and not him. The omitted information would not have vitiated probable cause. Qualified immunity protects the type of discretion used hereby Bailes in determining that probable cause existed for the arrest of Plaintiff.

It is important to note that neither of the defendants in this case made the decision to file charges against Plaintiff. That decision was made solely by the Assistant District Attorney. Further, the only action of the defendants was to collect information and present it to the Assistant District Attorney. The only evidence Plaintiff has produced that Sheriff Ballard knew or should have known of Bailes alleged false affidavit was that in February 2002 (a month after the incident, and over two weeks after his arrest) Plaintiff had a conversation with the Sheriff. In that conversation, Plaintiff states he informed Sheriff Ballard that Bailes told Plaintiff he didn't have the right to tell trespassers to leave. Plaintiff did not tell Sheriff Ballard that he thought Bailes lied to the Assistant District Attorney or the Judge in order to obtain the arrest warrant. Plaintiff did not inform Sheriff Ballard that he was carrying a loaded 357 magnum pistol when he confronted the trespassers. For these reasons, the defendants in their individual capacities are entitled to qualified immunity.

Appendix B

Plaintiff's second cause of action is that the Haskell County Sheriff's Office ignored his requests to enforce the no trespassing laws as they related to McCurtain Lake Club, Inc.'s property. Defendants contend Plaintiff has no standing to bring any cause of action regarding failure to enforce trespassing laws for property owned by McCurtain Lake Club, Inc.

"As a general rule, a stockholder cannot maintain a personal action against a third party for harm caused to the corporation." *Guides, LTD v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002) *citing Stat-Tech Intern. Corp. v. Delutes*, 47 F.3d 1054, 1060 (10th Cir. 1995). "There is, however, an exception to this rule where the actions of the third party that injure the corporation also cause injury to the shareholder which is unique to himself or herself as a shareholder of the corporation and not suffered by the other shareholders. *Id.*

In the instant case, the alleged trespass did not occur on Plaintiff's leased 1/2 acre, but on common property owned by the corporation. Any damages suffered by Plaintiff were not unique to himself or his property, but would be the product of economic damages suffered by the corporation. In Plaintiff's Complaint, he alleges "that while acting as President of McCurtain Lake Club, Inc. [he] had been attempting to get the Haskell County Sheriff's Office to stop people from riding dirt bikes and arrest trespassers on land posted and owned by McCurtain Lake Club, Inc. . . ." As such, the corporation would be the proper party to bring a complaint regarding failure to enforce laws on its property. Therefore, to the extent Plaintiff seeks to assert violations

that occurred as a result of the Defendants' alleged failure to properly investigate trespasser violations on McCurtain Lake Club, Inc. property, Plaintiff does not have standing.

Further, if Plaintiff could establish standing, Plaintiff has not established a policy or custom of the McCurtain County Sheriff's Department which precluded investigation of trespassing laws. The Supreme Court, in *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978), held that municipalities could be liable under §1983 if

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

The Supreme Court further refined its *Monell* decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986), by holding that in order to affix liability to a municipality under §1983, the alleged unconstitutional acts must be committed by an official possessing final policymaking authority with respect to the alleged acts. Further, *Pembaur* made clear that "municipal liability may be imposed for a single decision by municipal

policymakers under appropriate circumstances . . . because even a single decision by such a body unquestionably constitutes an act of official government policy." *Id*

Alternatively, municipal liability may be based on the *existence of a widespread practice of which the policymakers must have been aware. Praprotnik*, 485 U.S. at 127. The offensive policy must emanate from an officially promulgated decision or from a practice which is well-settled and permanent. *Monell*, 436 U.S. at 691. In addition, there must be a showing that the policies of the municipality were directly connected to the constitutional deprivation. *Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990).

Considering the record in the instant case, there is no evidence of an offensive, widespread practice or policy of the McCurtain County Sheriffs Department which precludes, or hinders, enforcement of trespassing laws. To the contrary, the undisputed record reveals that since the late 1990s Plaintiff sought the assistance of the McCurtain County Sheriff's Department to enforce trespassing laws on land owned by McCurtain Lake Club, Inc. only four times prior to his arrest. Such a minor history of isolated incidents is insufficient to rise to the level of a constitutional violation.

Accordingly, Defendants' Motion for Summary Judgment is granted.

IT IS SO ORDERED this 21 day of June, 2005.

s/ James H. Payne
JAMES H. PAYNE
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 28 2006
OFFICE OF THE CLERK

No. 06-136

In The Supreme Court of the United States

ROGER GRUBBS,

Petitioner,

v.

KEN G. BAILES, MANUEL BALLARD, and HASKELL COUNTY, a duly designated county of the State of Oklahoma,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Petitioner Roger Grubbs, (Plaintiff in the underlying lawsuit, hereinafter "Petitioner"), presents two questions for the Court's review. First, Petitioner asks whether the grant of summary judgment in favor of the Respondents, Ken G. Bailes, Manuel Ballard, and Haskell County, a duly designated county of the State of Oklahoma, is contrary to the Court's decision in *Celotex Corp. v. Cantrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) thereby violating the standards of summary judgment and denying the Petitioner's right to a jury trial guaranteed by the Seventh Amendment. Respondents argue that the Tenth Circuit applied the correct standard for affirming summary judgment.

Second, Petitioner asks whether the Court of Appeals for the Tenth Circuit decided a federal question concerning the Petitioner's Equal Protection claim in conflict with Court of Appeals for the Seventh Circuit's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). Respondents contend there is no conflict between the Seventh Circuit's holding in *Esmail* and the Tenth Circuit's holding in the case at hand.

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SUMMARY OF REASONS TO DENY THE PETITION

A. SUMMARY OF MISSTATEMENT OF FACTS

The Petitioner claims his Fourth Amendment rights were violated when he was allegedly falsely arrested and maliciously prosecuted under Oklahoma law for feloniously pointing of a firearm. The Petitioner argues that the Tenth Circuit improperly weighed evidence in granting summary judgment in favor of the Respondents. However, Petitioner is in error. The Tenth Circuit did not improperly weigh evidence contrary to this Honorable Court's holding in *Celotex Corp. v. Cantrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Rather, the Tenth Circuit found there was insufficient evidence presented to vitiate the existence of probable cause in the issuance of the warrant for the Petitioner's arrest.

The Petitioner further contends that the Tenth Circuit, in error, failed to consider his malicious prosecution claim because it found that he failed to plead or allege facts to support such a claim. The Petitioner again is in error. The Tenth Circuit fully considered the malicious prosecution allegations as presented in the Petitioner's Fourth Amendment claim. Additionally, based on the facts particular to the Petitioner's allegations of malicious prosecution, the Tenth Circuit noted the Petitioner did not pursue the more likely claim of a First Amendment violation, and held it would not consider such a claim for Petitioner's failure to plead a First Amendment cause of action. Furthermore, the Tenth Circuit considered the Petitioner's clash with the Excise Board Member in its analysis of the Fourteenth Amendment Equal Protection

claim based on selective enforcement of the law, but noted that the Petitioner had failed to factually support any relationship between this clash and the failure to enforce the trespass laws. The Tenth Circuit further found that the Petitioner failed to support his Equal Protection claim by demonstrating how he was treated differently by persons similarly situated.

B. SUMMARY OF MISSTATEMENT OF LAW

Petitioner further claims there is a split in the authority between the Seventh and Tenth Circuits regarding selective enforcement claims under the Equal Protection Clause of the Fourteenth Amendment. The Petitioner is incorrect that the Seventh Circuit has held that a selective enforcement claim does not require evidence of unequal treatment under the law. In fact, the Seventh and Tenth Circuit are in accord regarding selective enforcement claims under the Equal Protection Clause.

STANDARD OF REVIEW

The Standard of Review Concerning Motions for Summary Judgments is *de novo. Haggerman v. United Transp. Union*, 281 F. 3d 1189 (10th Cir. 2002).

STANDARD OF LAW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving

party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of demonstrating the absence of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it is essential to the proper disposition of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A movant's summary judgment burden may be met properly by reference to the lack of evidence in support of Plaintiff's position. *Celotex*, 477 U.S. at 325. There is no issue for trial unless there is sufficient evidence for a jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 249-50. If the evidence is not significantly probative, then summary judgment is appropriate. *Id.* All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party, however, "allegations alone will not defeat summary judgment." *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526, 530 (10th Cir. 1994).

STATEMENT OF THE CASE

Petitioner Roger Grubbs petitions from the Tenth Circuit's affirmation of summary judgment in favor of the Respondents, Haskell County, Sheriff Manual Ballard, and Undersheriff Ken Bailes in this action under 42 U.S.C. § 1983. Petitioner alleged in his Complaint that Defendants violated his constitutional rights in two respects: (1) denying him equal protection under the law by failing to enforce trespass laws to protect his property, and (2) causing him to be arrested and prosecuted maliciously and without justification for a firearm offense, based on misleading information provided to the prosecuting attorney, after he personally confronted three trespassers.

Petitioner is one of some twenty shareholders in the McCurtain Lake Club Inc. (MLC), a corporation formed to acquire and hold certain lakeside land for the use of the shareholders. MLC owned the land and granted certain possessory rights to all shareholders free of charge. Specifically, each MLC shareholder was "leased" a cabin site for his or her exclusive use and was granted joint use of the remaining common areas. At the time of his arrest, Petitioner was president of the corporation, but at the time of the filing of his Complaint, he was not an officer.

One of the common areas next to MLC property was used by the public for off-road activities involving dirt bikes, ATVs, and the like. Petitioner testified in his deposition that since the late 1990's, he sought the assistance of the McCurtain County Sheriff's Office only four times requesting enforcement of the trespassing laws by these off-roaders onto MLC property. Regardless, on January 1, 2002, he took the law into his own hands. Armed with a pistol, he confronted three people, a woman, her son, and her nephew, who he insisted were riding four-wheelers onto MLC property. Accounts of this incident differ: Petitioner claims he merely showed the alleged trespassers that he was armed for self-protection; they reported that the Petitioner pointed the pistol at them and threatened them with it while ordering them to get off the property. Undersheriff Bailes was directed to investigate the conflicting complaints. He took statements from all parties and passed these on to assistant district attorney Danita Williams. He did not recommend any particular action, though he did comment that he did not believe the property had been posted properly, and he did not believe there is a clear policy on what Petitioner's duties were as president of MLC. Bailes also stated that Petitioner had no

right to pull a weapon on another person just to assert his opinions.

Based on the statements and her own interviews with the complaining witnesses, Williams made the decision to prosecute Petitioner. She directed Bailes to fill out a probable cause affidavit and then she presented the affidavit and the other collected documents to the State District Court Judge to secure a warrant. Petitioner was charged with violating Okla. Stat. tit. 21, § 1289.16 (Felony Pointing Firearms), for wilfully pointing a handgun at 13 year old J.H. his cousin J.A. and his aunt Bobbie Jean Anderson for the purpose of threatening and ordering them off the property where they were riding. Petitioner surrendered to authorities after reading about the issuance of a warrant for his arrest in the local newspaper. Petitioner posted a bond without spending any time in jail. The criminal case proceeded. Petitioner waived his right to a preliminary hearing. Then on the eve of trial, Petitioner, through his counsel, entered into an agreement to dismiss the case without prejudice upon payment of court costs. Petitioner then brought an action challenging his arrest and complaining of the Sheriff's failure to enforce the property rights of MLC and its members.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD NOT GRANT CERTIORARI BASED ON THE PETITIONER'S INCORRECT ASSERTION THAT THE COURT OF APPEALS COMMITTED ERROR.

This Court has long stated that certiorari jurisdiction is not merely a tool for the correction of perceived errors by

the lower federal courts, "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981). Rather, certiorari jurisdiction should be used only in those "cases of peculiar gravity and general importance," or to secure uniformity in the Circuits. *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J. dissenting) (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916)). The Petitioner urges this Court to grant certiorari to reapply the facts of his case to the law and to correct a perceived conflict between the Seventh and Tenth Circuits. However, the Petitioner has failed to demonstrate any such conflict and his Petition is nothing more than a request for appellate review concerning the application of undisputed facts to well established doctrine.

II. THE TENTH CIRCUIT CORRECTLY FOUND INSUFFICIENT EVIDENCE IN THE RECORD TO VITIATE A FINDING OF PROBABLE CAUSE, AND PROPERLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS.

The Petitioner was charged with feloniously pointing of a firearm in violation of Okla. Stat. tit. 21, § 1289.16. The charge was based on a probable cause affidavit and witness statements submitted to the Judge of the District Court of Oklahoma for Haskell County. The statute makes it a felony to:

> willfully . . . point a [firearm] or any deadly weapon . . . at any person or persons for the purpose of threatening or with the intention of discharging the firearm or with any malice or for

> any purpose of injuring, either through physical injury or mental or emotional intimidation or for the purposes of whimsy, humor or prank, or in anger or otherwise, but not to include pointing [a firearm] . . . in the defense of any person, one's home or property . . .

The Petitioner alleges that the warrant issued for his arrest was a product of a misleading presentation of material facts in the probable cause affidavit. Knowingly and recklessly omitting material information from a probable cause affidavit violates a person's Fourth Amendment rights. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1285-90 (10th Cir. 2004). However, for omissions to rise to the level of a Constitutional violation, the omitted facts must be material and be so probative as to negate probable cause. *Stewart v. Donges*, 915 F.2d 572, 582 n.13 (10th Cir. 1990). To ascertain whether there is a Constitutional violation, the affidavit must be examined as if the material omitted information had been included and determining whether probable cause would have still existed to issue the warrant. *See Pierce*, 359 F.3d at 1293-95.

The Tenth Circuit correctly found that Mr. Bailes' probable cause affidavit, and witness statements taken from the Petitioner as well as the other complainants were submitted to the State Court in order to secure an arrest warrant. *Grubbs v. Bailes*, 445 F.3d 1275, 1278-79 (10th Cir. 2006). The Tenth Circuit correctly rejected the Petitioner's argument that his statement taken by Mr. Bailes was sufficient, in and of itself, to vitiate probable cause. *Id.* at 1278. The Tenth Circuit found that Mr. Grubbs' statement contained no "compellingly credible" or "uniquely exculpatory" information. *Id.* at 1278. The Tenth Circuit correctly opined that "a suspect's contradiction of a witness'

accusations is not sufficient to vitiate probable cause; otherwise, it would be virtually impossible to secure a warrant for anyone but a confessed offender." *Id* at p. 1278. The Tenth Circuit correctly found the facts within Mr. Grubbs' statement "unremarkable in a criminal law setting". *Id* at 1279.

The Tenth Circuit further considered whether the omission of certain facts would have vitiated probable cause. The Tenth Circuit emphasized that the facts that the Petitioner alleged vitiated probable cause were not material to that determination. *Id.* The Tenth Circuit found that each of the facts allegedly omitted from the affidavit were material only to the issue of whether the complaining witnesses were trespassing. *Id.* The Tenth Circuit found that Oklahoma law permits the defense of one's own home or property, but that the defense does not encompass threatening trespassers with a firearm. *Id.* The Tenth Circuit concluded that any facts that the Petitioner could provide that tended to show the witnesses were trespassing would not vitiate probable cause for the issuance of an arrest warrant under Okla. Stat. tit. 21, § 1289.16, Felony Pointing Firearms.

The Petitioner argues that the Tenth Circuit interpreted Oklahoma law incorrectly regarding the use of firearms in defense of property. The Petitioner urges that the Tenth Circuit's reliance on Oklahoma Supreme Court precedent prior to 1947 was improper in light of the statutory provision enacted in 1971. However, the Petitioner's argument in this regard is flawed. Overlooking the fact that none of these cases have been abrogated by Okla. Stat. tit. 21, § 1289.16, the Petitioner fails to mention that defense of property is defined within the Oklahoma Statutes. Defense of property is justified under Oklahoma law only "[w]hen committed . . . in preventing

or attempting to prevent . . . any trespass or other unlawful interference with real or personal property in [the lawful possession of the defender]; **provided the force or violence used is not more than sufficient to prevent such offense.**" Okla. Stat. tit. 21, § 643. (emphasis added). This statute is wholly consistent with the Oklahoma Supreme Court opinions cited by the Tenth Circuit in its order, which hold that absent the threat of felonious activity, defense of property only encompasses the use of reasonable non-deadly force. Therefore, the Tenth Circuit was absolutely correct in its interpretation of Oklahoma law.

The Petitioner alternatively urges that since the destruction of property in Oklahoma may constitute a felony, then the omission of the fact regarding the cutting of the barbed wire fence necessarily vitiated the determination of probable cause. The relevant statute in Oklahoma is Okla. Stat. tit. 21, § 1760, which makes it a felony for a person to destroy the property of another in excess of $2,500, otherwise it is a misdemeanor. Even assuming, for argument's sake, that the Petitioner stated he witnessed the complaining witnesses cut the barbed wire fence (which is not in the record), the repair value of the barbed wire fence would not transmute what is otherwise a misdemeanor offense under Oklahoma law into a felony. Nevertheless, as already emphasized by the Tenth Circuit, this fact is both immaterial and insufficient to negate probable cause that the Petitioner committed the crime of feloniously pointing of a firearm.

It is improvident to hold that a justification or an excuse to a crime vitiates probable cause to make an arrest for that crime. Especially, as here, where the underlying acts for the commission of a crime are present but the offender claims he is justified or excused. It is not the

province of a police officer to determine whether or not someone is guilty or innocent of a crime, but only whether or not there is reasonable belief that the essential elements of a crime have been committed by the person being arrested. When an officer receives information about an alleged offense from a witness who it seems reasonable to believe is telling the truth, the officer has probable cause to make an arrest. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986). Here, Mr. Bailes had the statements of three witnesses. Furthermore, as was stated by the Tenth Circuit in its Order, permitting an assertion of a justification or an excuse to a crime to vitiate probable cause would make securing an arrest warrant impossible without a confession. 445 F.3d at 1278. The Tenth Circuit's affirmation of the district court's grant of summary judgment in favor of the movants was proper under Fed. R. Civ. P. 56 in light of the Petitioner's failure to create a genuine issue of fact to submit to a jury regarding the issue of probable cause. Accordingly, with no issue sufficient to submit to a jury, the Petitioner's right to a jury trial under the Seventh Amendment has not been infringed.

III. THERE IS NO CONFLICT BETWEEN THE SEVENTH AND TENTH CIRCUITS REGARDING SELECTIVE ENFORCEMENT CLAIMS SOUGHT PURSUANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Petitioner argues that the Tenth Circuit incorrectly stated he failed to argue his malicious prosecution claim to the district court, and improperly denied his equal protection claim. In support of this argument, the Petitioner contends that the Seventh and Tenth Circuits are in

conflict regarding selective enforcement claims pursued under the Equal Protection Clause of the Fourteenth Amendment, and the Seventh Circuit authority establishes the proper standard. However, the Petitioner has misread the Tenth Circuit opinion in this case, as well as Seventh and Tenth Circuit authority regarding selective enforcement claims.

As an initial matter, the Tenth Circuit did find that the Petitioner "interject[ed] his suspicion" throughout his brief that Mr. Bailes omitted facts from the probable cause affidavit and failed to enforce the trespassing law in retaliation for the Petitioner's exposure of a county official for illegally dumping trash. 445 F.3d at 1279. The Tenth Circuit noted that the Petitioner advanced this argument only generally, instead of asserting the more common claim of a First Amendment violation, which the Petitioner failed to plead or even argue before the district court. *Id.* More importantly, the Tenth Circuit recognized that the Petitioner instead of pursuing a First Amendment claim, "chose to proceed on other constitutional grounds," specifically his Fourth Amendment false arrest and malicious prosecution claims, and his Fourteenth Amendment Equal Protection claim of selective enforcement. *Id.*

After discussing the merits of the Fourth Amendment claim, the Tenth Circuit then analyzed the Petitioner's Equal Protection claim and found no evidence in the record that demonstrates the Petitioner's clash with the county official was related in any manner to the failure to enforce the trespassing law. *Id.* at 1282, n.3. The Tenth Circuit further found the evidence presented to the district court was insufficient to demonstrate a triable issue of unconstitutionally inadequate law enforcement, and emphasized that the Petitioner had even failed to establish that he was

treated differently than similarly situated persons as required in an Equal Protection analysis. *Id.* at 1282.

The Petitioner challenges this holding of the Tenth Circuit, and claims that there is a conflict between the Seventh and Tenth Circuits concerning whether unequal treatment is a requirement for asserting a valid Equal Protection claim in selective enforcement claims. In support of this contention, the Petitioner cites *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995).

The Petitioner argues that the Seventh Circuit in *Esmail* recognized a claim for selective prosecution under the Fourteenth Amendment, "even if there has been no unequal treatment where other parties have been treated more leniently." In *Esmail*, the plaintiff was a liquor dealer who claimed the local government selectively denied his application for a liquor license, because he had employed an unregistered manager for an hour and a half. *Id.* at 177. The *Esmail* plaintiff presented evidence that other liquor dealers had received liquor licenses in spite of more egregious offenses, such as serving liquor to minors and committing battery against police officers. *Id.* at 178. The *Esmail* Court recognized that equal protection under the law does not just mean treating "identically situated persons identically." *Id.* at 179. The *Esmail* Court expounded that the element of unequal treatment is satisfied in a selective prosecution claim, if others similarly situated to a plaintiff, in that case liquor license applicants, receive lighter or no sanctions for more serious infractions. *Id.* at 179.

The *Esmail* Court did not hold that a plaintiff need not demonstrate unequal treatment in an Equal Protection claim. The Seventh Circuit did hold that unequal

treatment in selective prosecution cases is alone insufficient to state a Constitutional claim, because selective prosecution has two meanings under the law. *Id.* at 178-79. Citing *Wayte v. United States*, 470 U.S. 598, 607-08, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985), the Seventh Circuit explained selective prosecution is nonactionable under the Constitution if the resulting pattern of nonenforcement is, *inter alia*, random, a result of ineptitude or due to a lack of adequate resources. *Id.* at 178. For the unequal treatment to become actionable, the Seventh Circuit held that a plaintiff must demonstrate the selective prosecution was "spiteful" retaliation "for reasons wholly unrelated to any legitimate state objective." *Id.* at 180.

Furthermore, the Tenth Circuit is in complete harmony with the Seventh Circuit with respect to selective enforcement claims pursued under the Equal Protection Clause of the Fourteenth Amendment. In *Bartell v. Aurora Public Schools*, 263 F.3d 1143 (10th Cir. 2001), the Tenth Circuit, relying on *Esmail*, held that a selective enforcement claim is one cognizable under the Fourteenth Amendment. The Tenth Circuit, quoting *Esmail*, held that to sustain a selective enforcement claim, a plaintiff must prove that he was singled out for persecution "wholly unrelated to any legitimate state objective." *Id.*, 263 F.3d at 1149. The Tenth Circuit further emphasized that a plaintiff must still demonstrate that he was treated differently than similarly situated persons. *Id.*

The Tenth Circuit's opinion in *Grubbs v. Bailes* does not conflict with *Bartell* or *Esmail*. Rather, the Tenth Circuit found "there is no evidence in the record that defendants' alleged failure to enforce trespassing laws with respect to MLC property was related to plaintiff's

clash with the excise board member he turned in for illegally dumping trash." 445 F.3d at 1282 and n.3. The Petitioner's assertion that the Tenth Circuit is in conflict with the Seventh Circuit is wholly unfounded. The Petitioner's plea to this Court is premised simply on a perceived error in application of facts to the law by the lower courts, which is an insufficient purpose to grant certiorari jurisdiction. Accordingly, the Petition should be denied.

CONCLUSION

Petitioner has clearly failed to submit a question to this Court worthy of review. As discussed, Petitioner's Petition for Writ of Certiorari, Petitioner has presented only two questions for the Court, one of which asks this court to review the lower federal court's application of uncontroverted facts to correctly stated law, the other incorrectly states there is a conflict among the Seventh and Tenth Circuits regarding the standards to be applied in an Equal Protection Claim. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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